No. 04-5293

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IN THE SUPREME COURT OF THE UNITED STATES

CARMAN L. DECK, *Petitioner,*

v.

STATE OF MISSOURI, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF AMICUS CURIAE OF THE STATES OF CALIFORNIA, ALABAMA, COLORADO, DELAWARE, INDIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Are the Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed though penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the state to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

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INTEREST OF AMICI

Amici curiae are the legal representatives of their states' executives and of the People in their states' appellate and post conviction litigation. The States have a substantial interest in constitutional rules that impact a trial judge's authority to maintain the safety and decorum of the courtroom.

Amici have particular interest in this case because it will be the first time this Court will consider the constitutional implications of restraining a defendant in a criminal proceeding. Since the use of restraints in trial is not uncommon in both state and federal courts, this decision will impact every State, in both capital and noncapital cases. The States have compelling interests in the security of courtroom proceedings, preventing escape, and in the orderly administration of justice. In many instances, restraints present the best method to protect these important interests at trial. A constitutional rule governing restraints that is overly strict or rigid will have a substantial impact on the States' ability to protect these interests.

SUMMARY OF ARGUMENT

This Court has recognized, in several cases, that imposition of restraints may be necessary to further a compelling state interest. *Holbrook v. Flynn,* 475 U.S. 560, 568 (1986); *Estelle v. Williams,* 425 U.S. 501, 505 (1976); *Illinois v. Allen*, 397 U.S. 337, 344 (1970). However, this Court has never expressly evaluated the constitutional implications of restraining a defendant in a criminal trial. A clear constitutional rule is necessary to resolve the disparate rules among the lower courts.

Restraints should not be labeled as "inherently prejudicial." Rather, their prejudicial impact, if any, should be determined on a case-by-case basis. Courts have traditionally overestimated the impact visible restraints have on jurors. It is likely that today's jurors consider restraints as nothing more that ordinary security procedures that apply in all criminal cases. In addition, the important interests restraints may serve and the great variety of restraints available weighs against sweeping generalizations of the prejudicial impact of all restraints.

–The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair and impartial trial, and is the constitutional provision that should govern the use of restraints at trial. *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973). Under the Due Process Clause, it is possible to strike a balance between the substantial state interests restraints serve and the potential for prejudice to the defendant that restraints may cause. A flexible standard of review provides adequate protection to a defendant's right to a fair trial without unnecessarily hampering trial courts with constitutionally-mandated procedural requirements.

Since due process review is ultimately limited to consideration of fundamental fairness, a defendant claiming that the imposition of restraints was unconstitutional must establish more than that the restraints were improperly imposed. A defendant must also establish that any restraints resulted in actual prejudice. Accordingly, to establish a due process violation based on the use of restraints in a criminal proceeding, a defendant must establish: (1) the state's imposition of the restraints was an abuse of discretion; and (2) the restraints rendered his trial fundamentally unfair.

ARGUMENT

I.

THIS COURT SHOULD ESTABLISH A CONSTITUTIONAL RULE GOVERNING RESTRAINTS IN ALL CRIMINAL PROCEEDINGS

The facts of the instant case involve imposition of physical restraints[1/] in a penalty phase retrial. However, amici urge this Court to establish a rule that applies to criminal proceedings in general rather than limit its decision to the penalty phase of a capital case. Restraints are not unique to capital cases. Both state and federal courts throughout the country have evaluated the constitutionality of restraints in numerous noncapital and capital cases alike. *See, generally*, Sheldon Shapiro, Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17 (1979). Although the Eighth Amendment imposes specific rules applicable only to capital cases, in general, constitutional rights apply with equal force regardless of the type of criminal case involved. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 606-07 (2002) (Sixth Amendment right to jury determination of all elements applies equally to capital and noncapital cases); *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (the

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1. Amici will use the term "restraints" in this brief to generally include "all forms of handcuffs, shackles, manacles, leg irons, and other restraining devices." *People v. Duran*, 545 P.2d 1322, 1326 n.5 (Cal. 1976).

same standard for evaluating claims of ineffective assistance of counsel applies to trials and to capital sentencing proceedings).

This Court has not previously directly addressed the issue of restraints. The closest this Court has come to this issue was its review of security procedures not involving restraints in *Holbrook v. Flynn*, 475 U.S. 560 (1986). In that case, this Court evaluated a constitutional attack on security measures in the courtroom under the due process clause of the Fourteenth Amendment. Two other cases, *Illinois v. Allen*, 397 U.S. 337 (1970) and *Estelle v. Williams*, 425 U.S. 501 (1976), also include discussions of restraints, though neither case involved the imposition of restraints at trial. Because this Court has never directly addressed the constitutionality of imposing restraints on a defendant in a criminal proceeding, lower courts have resorted to interpreting this Court's dicta in *Holbrook*, *Allen*, and *Williams* when evaluating the propriety of a trial court's order to restrain a defendant at trial.

The lack of clear guidance from this Court on restraints has resulted in disparate rules among lower courts. For example, the Ninth Circuit has created a two-step procedure governing the imposition of restraints. "First the court must be persuaded by compelling circumstances 'that some measure was needed to maintain the security of the courtroom.' Second, the court must 'pursue less restrictive alternatives before imposing physical restraints.'" *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir. 1990).[2/] In contrast, the Fifth Circuit has expressly rejected a "least means" analysis of restraints, recognizing the focus should be on "whether it was reasonable [for the trial court] to conclude at the time that the restraint was necessary." *Marquez v. Collins*, 11 F.3d 1241, 1244 (5th Cir. 1994). Finally, the Fourth Circuit expressly requires the trial court, before imposing restraints "to state for the record, out of the presence of the jury,

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2. The constitutional requirement imposed by the Ninth Circuit on trial courts to "pursue less restrictive alternatives" was derived from the court's reading of dicta in *Illinois v. Allen*.

the reasons therefor and give counsel an opportunity to comment thereon." *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970).

The significant differences in the standards of review between just three Federal Circuits illustrates the need for uniform standards on this issue. Absent such guidance, lower courts evaluating restraints will continue to rely on this Court's dicta in cases such as *Illinois v. Allen*, *Holbrook v. Flynn*, and *Estelle v. Williams*, three cases in which no restraints were imposed.

II.

THE USE OF RESTRAINTS IN A CRIMINAL PROCEEDING IS NOT AN INHERENTLY PREJUDICIAL STATE ACTION

It is important at the outset to recognize that the use of restraints on a defendant at trial is not inherently prejudicial. Amici recognizes that this Court, in dicta, has characterized binding and gagging a defendant as an "inherently prejudicial" practice that should be subject to close judicial scrutiny. *Holbrook v. Flynn*, 475 U.S. at 568-69. However, because *Holbrook* was not a case about restraints at all, this Court did not need to engage in a detailed, fully-realized analysis of the actual prejudice caused by restraints in general nor the important interests restraints serve. Consequently, *Holbrook's* characterization of shackles as "inherently prejudicial" should now be placed in context.

In the past, this Court has found certain practices to be "inherently prejudicial." The standard for governing whether a state practice is inherently prejudicial is whether "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U.S. 532, 542-43 (1965). Although restraints should not be imposed absent evidence in the record

justifying the need, their unjustified use should not give rise to a presumption of prejudice. Several reasons support this position. First, amici respectfully submit that the prejudicial effect of restraints in general has been overestimated by the courts. Second, this Court and many lower courts have consistently recognized that restraints may serve "compelling state interests" of maintaining courtroom security and controlling unruly defendants. Third, the wide variety of security measures that could technically be called "shackling" is incompatible with a one-size-fits-all label of "inherently prejudicial."

A. The Label "Inherently Prejudicial" Found In *Holbrook v. Flynn* Is Dicta And Is Best Understood In The Context Of That Case

This Court's characterization of shackling as an "inherently prejudicial practice" in *Holbrook* was dicta and was made in reference to the extreme shackling discussed in *Illinois v. Allen*, 397 U.S. 337. *Holbrook*, 475 U.S. at 568-69. In *Holbrook*, this Court's consideration of restraints focused exclusively on *Allen*'s discussion of the prejudice that could result from the jury's view of a totally bound and gagged defendant. *Id.* Since *Holbrook* was not about restraints at all, this Court did not discuss nor consider the impact of less extreme restraints on a jury. Binding and gagging a defendant in full view of the jury throughout a trial is the most extreme form of restraint that could be utilized by a trial court. This Court's description of such a situation as "inherently prejudicial" is understandable.[3] However, while the most extreme form of restraint may fairly

3. Despite the extreme nature of such restraints, this Court nevertheless found that their use at trial in the right circumstances might be "the fairest and most reasonable way to handle a[n unruly] defendant. *Allen*, 397 U.S. at 344.

be characterized as "inherently prejudicial," it does not follow that all forms of restraint should be so labeled. Accordingly, this Court's dicta in *Holbrook* should not be interpreted to cover all forms of restraints that states may use.

B. The Prejudicial Impact Of Restraints On Jurors Has Been Overstated

Before this Court declares that restraints are "inherently prejudicial," consideration must be given to the actual effect visible restraints are likely to have on today's jurors. Amici respectfully submit that the prejudicial impact of restraints has been overstated by the courts.

Despite the lack of empirical studies on the matter, courts historically have assumed that visible restraints have a negative impact on a defendant's presumption of innocence. *See, e.g., Kennedy v. Cardwell*, 487 F.2d at 104. Through repetition, this assumption has cemented in the collective psyche of the courts. It is now virtually a given that visible restraints will have a devastating effect on the jury's perception of a defendant. *See, e.g., State v. Damon*, 25 P.3d 418, 420 (Wash. 2001) ("the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man"). Amici disagree with this premise.

Courts should not lightly discount the ability of jurors to focus on the evidence before them. As this Court wisely noted in *Holbrook v. Flynn*,

> Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the

> State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct.

475 U.S. at 567. This Court further observed, "When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained." *Id.* at 567-68. Indeed, jurors are routinely instructed that a defendant is presumed innocent, that the people have the burden of proving the defendant guilty beyond a reasonable doubt, and that their decision is to be based solely on the evidence presented at trial. This Court presumes that jurors follow instructions from the trial court. *Greer v. Miller*, 483 U.S. 756, 767 (1987).

Thus, a California Appellate Court sagely noted over 30 years ago,

> A juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. . . . . Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees.

People v. Long, 38 Cal.App.3d 680, 689 (Cal.App. 1974).

The Sixth Amendment right to a jury is founded upon the belief that jurors approach their duties with common sense and intelligence. *See Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 526 (1956). This underlying belief must be factored into any consideration of the impact that visible restraints may have on a jury. This Court should not presume that a jury will cast aside its legal obligations and engage in rank speculation regarding dangerousness when faced with a restrained defendant.

Furthermore, no consideration of the impact of restraints and security measures on a jury should overlook the realities of

our modern, post-September 11 society. Security measures have become a commonplace and accepted part of everyday life. *See United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003) ("Requiring members of the public to proceed through a metal detector, show identification, and sign a log-in form are similar to the security methods used in many government and private office buildings in this country"). Jurors today encounter heightened security procedures everyday and are not likely to be surprised or shocked by visible security measures in a courtroom. Indeed, most jurors are likely to have walked through a metal detector on their way into the courthouse.

Consequently, jurors exposed to a restrained defendant are likely to conclude that any restraints are a routine part of courtroom security. Restraints that reasonably appear to be part of the ordinary security measures in the courtroom are not likely to have a prejudicial impact on the jury. *See Holbrook*, 475 U.S. at 571, citing *Dorman v. United States*, 435 F.2d 385, 397 (1970) (greater danger of prejudice if jury aware that arrangements are extraordinary). This is not to say that restraints cannot have a prejudicial impact on jurors. Certainly if extreme restraints are used, such as binding and gagging, jurors would likely conclude that such restraints were not ordinary security measures. Such a situation would likely pose a danger that the jury would view the restraints as an "indication[ ] of the need to separate a defendant from the community at large." *Holbrook*, 475 U.S. at 569. Thus, the determination of whether visible restraints are prejudicial to a defendant must focus on the specific circumstances of each case. To simply assume jurors are adversely affected whenever they observe a defendant in restraints would turn a blind eye to how jurors likely view and consider restraints on a defendant.

In sum, Amici submit that the prejudicial impact on jurors of seeing a defendant in restraints has been exaggerated in the past and certainly must be reconsidered in light of the heightened security that is now a part of everyday life. Although visible restraints, especially extremely severe

shackles, may have a prejudicial impact in an individual case, restraints in general should not be labeled "inherently prejudicial."

C. Declaring All Restraints "Inherently Prejudicial" Ignores The Important State Interests Restraints Serve And The Wide Variety Of Restraints That Exist

Because of the legitimate state interests that restraining a defendant may serve, and the wide variety of restraints that states may employ, a declaration that all restraints are "inherently prejudicial" goes too far.

The use of restraints at trial serve important state interests. *See Holbrook*, 475 U.S. at 568; *Williams*, 425 U.S. at 505 (recognizing that restraints, unlike prison clothes can further an "essential state policy"); *Allen*, 397 U.S. at 344 ("binding and gagging might possibly be the fairest and most reasonable way to handle" a particularly obstreperous and disruptive defendant). The Fourth Circuit in *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970) recognized many of the important state interests that restraints may serve in a criminal proceeding.

> The judge presiding at the trial, the jurors, courtroom personnel and spectators are entitled to security in the performance of their functions or in observing the trial. The members of the public out of the courtroom are entitled to security in the pursuit of their daily activities. The public also has an interest in the expeditious trial of persons accused of crime, and an interest in preventing the guilty from being at large and committing other offenses.

The courtroom is the centerpiece of a state's criminal justice system and state action designed to protect the security and decorum of this centerpiece should not lightly be declared

inherently prejudicial.

In addition to the compelling state interests that restraints serve, the great variety of potential restraints also weighs against a finding that all restraints are inherently prejudicial. There is no one type of restraint utilized by the states, and new security devices are being developed continually. *See, e.g., People v. Mar*, 52 P.3d 95, 97 (Cal. 2002) (reviewing the use of a "stun belt" as a security measure during trial). Restraints utilized by the states vary widely in their visibility and severity. Some restraints are so minimal that they are not even visible to the jury. *See, e.g., Williams v. Woodford*, 306 F.3d 665, 690 (9th Cir. 2002) (thin, metal leg chain not visible to the jury); *Odom v. State*, 769 So.2d 189, 193 (Miss Ct. App. 2000) (waist chain hidden from view of jury). At the other extreme of severity is the total binding and gagging of a defendant in full view of the jury. *See Allen*, 397 U.S. at 344. The practical reality, however, is that most restraints fall somewhere between these two extremes. A unobtrusive waist chain or restraining belt that secures a defendant to his or her chair is a security procedure of which the jury might not even be aware. To condemn all restraints as inherently prejudicial ignores the reality that many restraints that are utilized by today's courts will not prejudice a defendant at all.

This Court in *Holbrook* expressly eschewed a bright-line approach to assigning prejudice when reviewing security procedures, emphasizing that:

> "reason, principle, and common human experience," *Williams, supra, at 504*, counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

475 U.S. at 569. Similarly, given the "variety of ways" restraints can be imposed, the same case-by-case approach

established in *Holbrook* should apply to constitutional challenges of restraints.

III.

CONSTITUTIONAL REVIEW OF RESTRAINTS SHOULD BE LIMITED TO A DUE PROCESS FOCUS ON FUNDAMENTAL FAIRNESS

"Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). "[A] state rule of law "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Since the use of restraints is not expressly governed by any constitutional provision, a constitutional challenge to restraints should be governed by the due process clause. Absent a specific constitutional violation, federal habeas review of trial error is limited to whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.* at 642.

Given the narrow focus of the Due Process Clause, any constitutional rule governing restraints should be similarly focused. A blanket prohibition against restraints or detailed procedural requirements would be a "broad exercise of supervisory power" inconsistent with the narrow due process review established by the constitution. *See Donnelly v. DeChristoforo*, 416 U.S. at 642.

A. The Imposition Of Restraints Are Necessary In Certain Circumstances To Serve Compelling State Interests

In *Estelle v. Williams*, 425 U.S. at 505, this Court held that compelling a defendant to appear in prison clothes at trial violated due process. An important factor in this Court's decision was the recognition that "compelling an accused to wear jail clothing furthers no essential state policy," unlike physical restraints. *Id.* Thus, a due process analysis of the use of restraints at trial must take into account the important benefits restraints may provide.

Despite the possibility of prejudice restraints may present, courts have consistently recognized that restraints are necessary in some cases. "[D]ue process concerns 'must be balanced against the court's obligation to protect the court and its processes, and to attend to the safety and security of those in the courtroom.'" *Bagwell v. Dretke*, 372 F.3d 748, 754 (5th Cir. 2004) (quoting *United States v. Nicholson*, 846 F.2d 277, 279 (5th Cir. 1988)). Generally, courts find that the right to appear in court without restraints may be relinquished where a defendant's past or present conduct suggests the possibility he may try to escape, pose a threat to the safety of the people in the courtroom, or disrupt order in the courtroom. *See, e.g., Kennedy*, 487 F.2d at 105; *Wood v. State*, 699 So.2d 965, 966 (Ala. Crim. App. 1997); *People v. Anderson*, 22 P.3d 347, 382 (Cal. 2001); *People v. Love*, 763 N.E.2d 829, 833 (Ill. App. Ct. 2002); *Evans v. State*, 571 N.E.2d 1231, 1238 (Ind. 1991); *Commonwealth v. Brown*, 305 N.E.2d 830, 834 (Mass. 1973); *People v. Williams*, 433 N.W.2d 356, 314 (Mich. Ct. App. 1988).

Examples of the application of these and similar factors abound in the case law. *See, generally*, Sheldon Shapiro,

Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17 (1979). For example, the Supreme Court of Kentucky upheld the imposition of restraints in a case in which the record showed that the defendant had escaped from prison five years earlier, had planned several escapes, and was skilled in martial arts. *Hill v. Commonwealth*, 125 S.W.3d 221, 235 (Ky. 2004). The Arizona Supreme Court found that the record supported the trial court's decision to have the defendant restrained where it showed that the defendant had prior convictions for three armed robberies and two first degree murders and had attacked a deputy sheriff while attempting to escape from jail. *State v. Lee*, 944 P.2d 1222, 1231 (Ariz. 1997). In a case where the defendant was charged with a "brutal murder" and had escaped while awaiting trial, the Missouri Supreme Court found no abuse of discretion when the trial court ordered restraints. *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. 1999). The California Supreme Court found that the defendant's "three reported fistfights [in jail], together with his extensive criminal history" supported the trial court's decision to restrain the defendant. *People v. Hawkins*, 897 P.2d 574, 586 (Cal. 1995). As the above examples illustrate, restraints are often necessary to ensure that the state's compelling interests in the security and decorum of the courtroom are protected.

There is little doubt, as this Court recognized in *Illinois v. Allen*, that the use of restraints may sometimes be the "fairest and most reasonable way to handle" a particular situation. 397 U.S. at 344. Any constitutional rule governing restraints should therefore be flexible enough to allow courts to use restraints when the circumstances of a case and the needs of the state require.

B. The Due Process Clause Has A Limited Role In Defining The Procedures Trial Courts Must Follow Before Imposing Restraints On A Defendant At Trial

In *Holbrook* this Court candidly acknowledged that its "task was not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom." 475 U.S. at 572. Rather, this Court's authority was "more constrained when reviewing a constitutional challenge to a state-court proceeding." *Id.* The only question facing this Court was whether the circumstances presented at trial "pose[d] an unacceptable threat to defendant's right to a fair trial." *Id.* A similar, limited approach should apply to the review of restraints.

The trial court has a duty and the power to take precautions to maintain security and order in the courtroom. *Wood*, 699 So.2d at 966; *Brown*, 305 N.E.2d at 834. Reviewing courts have universally recognized the need to allow the trial court wide discretion to decide whether physical restraints are necessary to protect those interests in light of all the circumstances. *See, e.g., Lee*, 944 P.2d at 1231; *People v. Boose*, 362 N.E.2d 303, 305 (Ill. 1977); *Brown*, 305 N.E.2d at 834; *Armentrout*, 8 S.W.3d at 108; *People v. Young*, 185 A.D.2d 369, 369 (N.Y. App. Div. 1992). As this Court has noted, "We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Allen*, 397 U.S. at 343.

Given the wide discretion afforded trial courts to maintain the security and decorum of the courtroom, no single procedure imposing restraints at trial should be constitutionally compelled. If the evidence establishing the need for restraints is clear in the record, the trial court need not hold a hearing on the matter.

"The process due must reflect the inherent case-specific character of the trial court's decision to restrain a defendant and the reality that the issue is usually collateral to the trial itself." *Marquez*, 11 F.3d at 1244. Any hearing conducted by the court may be informal and may dispense with the ordinary rules of admissibility of evidence. *Brown*, 305 N.E.2d at 836; *State v. Roberts*, 206 A.2d 200, 204 (N.J. Sup. Ct. App. Div. 1965).

Because the trial court must often act proactively to maintain security, and because of the numerous factors to be weighed, a "least means" analysis should not be constitutionally imposed on the trial court. *Bagwell*, 372 F.3d at 754; *Marquez*, 11 F.3d at 1244. As a practical matter, there may well be more than one way of dealing with a defendant who threatens courtroom security or decorum. For example, looking back, a reviewing court may observe that the trial court had the option of bringing more officers into the courtroom. The trial court, however, may simply have made a judgment call that sudden increased security would be more obvious and more likely to prejudice the defendant than restraints. *See Harrell v. Israel*, 672 F.2d 632, 637 (7th Cir. 1982) (recognizing that "[l]ess intrusive methods of insuring security, such as stationing guards around the courtroom, would probably be less effective and may have an even more detrimental impact on the jury than shackles".) Therefore, the Fifth Circuit correctly held "[t]hat in retrospect some lesser restraint might have sufficed is not determinative." *Marquez*, 11 F.3d at 1244. This Court in *Holbrook* refused to determine whether a less conspicuous deployment of officers may have been feasible in that case, recognizing that such considerations were not part of the due process analysis. 475 U.S. at 572; *see also Allen*, 397 U.S. at 343 ("No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations")

Amici recognize that this Court suggested in *Allen* "that no person should be tried while shackled and gagged except as a last resort." *Allen*, 397 U.S. at 343. This dicta should not be interpreted to establish a constitutional requirement that trial

courts may only impose restraints as a last resort and can best be understood in context. In that case, this Court discussed the propriety of trying a defendant who is *bound and gagged throughout trial*. Amici expect that trial courts would not impose such extreme restraints absent compelling need. However, *Allen* should not be read to establish a constitutional rule that restraints of any kind may only be imposed as a "last resort" over security measures that do not involve restraints. Indeed, a "last resort" requirement could lead to absurd results. Under such a rule, for example, a trial court would be forced to forego the use of an undetectable restraint in favor of a more-visible security measure, like increased bailiffs, that did not involve restraint. Consequently, a "last resort" requirement could compel a trial court to adopt security measures that are more likely to result in prejudice than restraints. The constitution should not be interpreted to compel such a result.

In sum, this Court should not constitutionalize procedures governing the imposition of restraints at trial. The Due Process Clause, and its focus on the fundamental fairness of a defendant's trial provides sufficient protection to the fundamental rights of a defendant while affording trial courts the necessary flexibility to ensure that the security and decorum of the courtroom are maintained.

IV.

A DEFENDANT CHALLENGING THE IMPOSITION OF RESTRAINTS HAS THE BURDEN OF ESTABLISHING THAT THE RESTRAINTS WERE UNJUSTIFIED AND THAT THEIR USE RENDERED THE TRIAL FUNDAMENTALLY UNFAIR

A defendant claiming that the imposition of restraints at trial violated the constitution has the burden of establishing a constitutional violation as a demonstrable reality. A defendant

must first preserve any constitutional claim with an appropriate objection at trial. Then, to establish a due process violation based on the use of restraints in a criminal proceeding, a defendant must demonstrate: (1) the state's imposition of the restraints was an abuse of discretion; and (2) the restraints rendered his trial fundamentally unfair.

A. A Defendant Must Object, On Constitutional Grounds, To The Imposition Of Restraints At Trial To Preserve The Issue For Review

A criminal defendant who is subjected to physical restraints and believes that the trial court abused its discretion should be required to raise any complaints to the trial court in the first instance. In *Estelle v. Williams*, this Court held that a defendant must object to wearing identifiable prison clothing at trial in order to preserve a constitutional claim for appeal. *Estelle v. Williams*, 425 U.S. at 512-13.

The same approach should apply in physical restraint cases. This Court recognized the possibility that a defendant might appear in prison clothing for strategic reasons, believing that it might elicit sympathy from the jury. *Id.* at 508. If prison clothing could produce that reaction, so could restraints. And in a penalty phase, a defendant might appear in prison clothing and restraints as part of a strategy to demonstrate acceptance of responsibility for his or her crime. *State v. Elmore*, 985 P.2d 289, 305, 307 (Wash. 1999). Moreover, it is possible that defense counsel could find monitoring a volatile client quite distracting, and that restraints could be a solution that would permit counsel to better serve the client by freeing counsel to concentrate on the proceedings. Deference to these sorts of strategic decisions therefore requires that the defendant be the one to raise the issue of restraints at trial.

B. A Defendant Claiming That Restraints Imposed At Trial Were Improper Must Establish That The Trial Court's Decision To Impose Restraints Was An Abuse Of Discretion

When a defendant challenges the necessity of restraints on appeal or habeas, he or she must first establish that the restraints were improperly imposed. The burden should be on the defendant to show that the trial court abused its discretion in finding that restraints were necessary. *Brown*, 305 N.E.2d at 834; *State v. Fisher*, 45 S.W.3d 512, 514 (Mo. Ct. App. 2001).

No magic formula exists to determine when restraints should be imposed in a given circumstance. As this Court has said in the related context of predicting future dangerousness, "It is not easy, of course, to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout out criminal justice system." *Jurek v. Texas*, 428 U.S. 262, 275 (1976). Considering the variety of possible restraints and multiple factors that may support a trial court's decision to restrain a defendant, an abuse of discretion standard of review is the most flexible and feasible standard for this issue. "[B]ecause the trial judge is uniquely situated to make this judgment call, he must be given considerable discretion." *Marquez*, 11 F.3d at 1244. "The trial judge can observe firsthand the defendant's demeanor; he can take into account the mood of others both inside and outside the courtroom, and the degree of security provided by the physical facilities where the particular trial is being held." *State v. Moen*, 491 P.2d 858, 861 (Idaho 1971).

Numerous factors may support a trial court's decision to impose restraints. Many courts have found the following non-exclusive list of factors to be relevant to the court's decision to impose restraints:

> The seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature, and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Boose, 362 N.E.2d at 305-06; *accord*, *Brown*, 305 N.E.2d at 836 n.18; *State v. Simmons*, 614 P.2d 1316, 1317 (Wash. Ct. App. 1980).

Moreover, in weighing the various factors identified above and deciding whether and how a defendant should be restrained, the trial court often relies on a variety of sources. The defendant's behavior in court may establish the necessity. Additionally, other circumstances may dictate the need for a court to act proactively rather than wait until a serious problem arises. *Kennedy*, 487 F.2d at 111; *Hawkins*, 897 P.2d at 586; *Love*, 763 N.E.2d at 835; *Simmons*, 614 P.2d at 1317. A trial court should be able to rely on the reports of law enforcement regarding the defendant's conduct in jail, including escape attempts and acts of violence, and may consider the officers' recommendations. *Brown*, 305 N.E.2d at 834; *Armentrout*, 8 S.W.3d at 107-08. The trial court should also be able to consider whether the defendant's record includes escape attempts or crimes of violence. *Roberts*, 206 A.2d at 204.

In addition to turning to these sources, the trial court should be able to consider the layout of the courtroom and whether it presents any particular security risks in deciding what security precautions to take. *Kennedy*, 487 F.2d at 110-11. The trial court should be able to consider whether enough security personnel are available to it for the duration of the proceedings,

how obvious their presence would be, and whether they might effectively deal with the concerns presented. *Id.* at 111.

Finally, mere deficiencies in the procedure for determining the necessity for restraints, even the lack of hearing, should not result in reversal if the reviewing court can conclude from the record on appeal that there was some justification for the security measures that were taken. *See, e.g., Moen*, 491 P.2d at 861; *see also Marquez*, 11 F.3d at 1247; *Lee*, 944 P.2d at 1231; *State v. Stewart*, 676 P.2d 1108, 1114 (Ariz. 1984); *Bryant v. State*, 785 So.2d 422, 429 (Fla. 2001). And again, as discussed above, the reviewing court should not indulge in hindsight and a "least means" analysis. *Bagwell*, 372 F.3d at 754; *Marquez*, 11 F.3d at 1244. If the record before the reviewing court reveals a legitimate basis for the trial court to impose restraints, the decision of the trial court should be upheld.

Given the numerous factors that can support a trial court's decision to impose restraints, a reviewing court should not lightly second-guess the trial court's decision. If the record contains evidentiary support for the trial court's imposition of restraints, a defendant's due process claim should be denied.

C. Improper Imposition Of Restraints Only Violates The Constitution If The Defendant Establishes That The Restraints Rendered The Trial Fundamentally Unfair Under The Totality Of The Circumstances

Even if a defendant establishes that the trial court abused its discretion by imposing restraints at trial, the due process inquiry is not over. Under the due process clause, a defendant is only entitled to relief if he or she establishes that the improper restraints rendered the trial fundamentally unfair.

1. A Defendant Should Have The Burden Of Establishing That The Imposition Of Restraints Resulted In Prejudice

A basic premise of the adversarial system is that a party complaining of error is required to establish the basis for that error. *Miller v. United States*, 78 U.S. 268, 299-300 (1870). Thus, a defendant claiming that the imposition of restraints violated the constitution has the burden of establishing an actual constitutional violation.

As discussed above, constitutional review of restraints should be governed by the due process clause, which focuses on the fundamental fairness of a criminal proceeding. Thus, it is not enough for a defendant to establish that restraints were unjustified or improper. A defendant must also establish that the restraints had a constitutionally significant impact on his or her trial. "[I]n most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused." *Estes*, 381 U.S. at 542-43.

This Court should not presume prejudice when restraints are improperly imposed. Instead, a defendant must establish that the restraints, when considered in the totality of the circumstances, rendered his trial fundamentally unfair. A defendant is in the best position, in most instances, to establish this prejudice.

Courts have recognized two major dangers that restraints may present to a defendant's right to a fair trial. First, the sight of a defendant in restraints may be interpreted by the jury as an "indication[ ] of the need to separate a defendant from the community at large"[4/] *Holbrook*, 475 U.S. at 569. Second, restraints may impair a defendant's ability to communicate with defense counsel or otherwise participate in his defense. *See People v. Harrington*, 42 Cal. 165, 168 (1871).

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4. As discussed above, Amici respectfully submit that this danger has been greatly exaggerated by the courts.

For either danger, a defendant is in the best position to establish prejudice. Both types of prejudice require certain foundational facts be established before any actual prejudice may be determined. For example, a claim that restraints had a negative impact on the presumption of innocence requires, at a minimum, a showing that the jury was aware of the restraints. Similarly, a claim that restraints impaired a defendant's ability to participate in his or her defense requires some evidence of the actual impact that the restraints had on the defendant. Rather than require the state to prove a negative (i.e., that no members of the jury saw the restraint or that the restraints did not impair the ability of the defendant to communicate with counsel), a defendant should be required to establish the foundational facts necessary to support a claim of prejudicial constitutional error. In most instances, defendants are in the best position to establish such facts, especially those involving the impact to the defendant himself. Once such foundational facts are established, a reviewing court can better consider the totality of the circumstances to determine if the defendant's trial was fundamentally fair.

Requiring a defendant to establish prejudice is consistent with basic principles of our adversarial system. A party claiming error has the burden of establishing that error. Since the use of restraints at trial only violates the constitution if their use was unjustified and rendered the trial fundamentally unfair, a defendant claiming constitutional error should be required to prove both circumstances to obtain relief.

2. Any Determination Of Prejudice From Restraints Must Consider The Totality Of The Circumstances

Given the multitude of circumstances in which restraints may be imposed and the numerous types of restraints that may be employed, any evaluation of prejudice must focus on the

specifics of each case. Indeed, this Court in *Holbrook* emphasized the need to focus on the totality of the circumstances when evaluating the constitutionality of security measures utilized by the state. "[A]ll a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." *Holbrook*, 475 U.S. at 572.

Although prejudice should be determined based on the specific facts of a case, several factors are likely to be relevant on the issue of prejudice. These factors include: the nature and visibility of the restraints; the length of exposure to the jury; any instructions regarding restraints; any pre-trial questioning of jurors; the nature of the charge against the defendant; and the strength of the evidence.[5/]

A reviewing court evaluating prejudice should first consider the nature and severity of the restraints employed. Unobtrusive restraints, such as a waist chain, even if perceived by the jury, are less likely to prejudicially affect a jury than more visible or obvious restraints. As discussed above, the less obvious and minimal the restraints imposed on a defendant, the greater likelihood that jurors will simply assume that the restraints are an ordinary matter of courtroom security that applies to every criminal case. *See Holbrook*, 475 U.S. at 567, 571. Restraints that reasonably appear to be part of the ordinary security measures in the courtroom are not likely to have a prejudicial impact on the jury.

In addition, a reviewing court should consider the length of the jury's exposure to restraints. In *Estelle v. Williams*, this Court considered the possible effect on the jury of prolonged exposure to a defendant in jail clothes, and observed "that the

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5. Amici are not attempting to present an exhaustive list of factors or circumstances that courts should consider when evaluating prejudice. Rather, amici are presenting those factors which are most commonly considered by the courts in these types of cases.

constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." 425 U.S. at 504-505. Thus, a fleeting exposure to restraints cannot be said to have the same impact on the jury as seeing a defendant visibly bound throughout a trial. *See, e.g., State v. Brooks*, 960 S.W.2d 479, 491-92 (Mo. 1997).

The instructions to the jury should also be evaluated. The extent that the trial court instructed the jury to ignore the presence of restraints or other security measures obviously has an impact on the potential prejudice to a defendant. "We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions. . . ." *Greer v. Miller*, 483 U.S. at 767; *see also Broadus v. State*, 487 N.E.2d 1298, 1303 (Ind. 1986) (court's instruction to jury to disregard restraints presumed to cure any prejudice).

Moreover, the mere fact that the jury was not instructed to disregard restraints should not be determinative of prejudice. When a trial court has undertaken efforts to hide restraints from the jury, the lack of instructions on restraints is understandable. A trial court may reasonably believe that the restraints were not observed by the jury and therefore refrain from instructing the jury for fear of drawing unnecessary attention to the restraints. In such a circumstance, it is incumbent on a defendant to request instructions if he or she fears that the jury observed any restraints.

In addition to instructions, the extent that jurors where questioned prior to trial regarding restraints should also be considered. Amici recognize that this Court expressed skepticism over jurors' ability to prospectively declare a particular situation will not effect them. *Holbrook*, 475 U.S. at 570. Amici respectfully disagree with this Court's skepticism. Questioning of jurors prior to trial provides jurors with guidance on what should and should not be considered during the trial. If specifically asked whether the sight of restraints will make a

difference in his or her consideration of the evidence, a reasonable juror would necessarily understand, at the outset, that restraints or other security measures are immaterial to the issue of the defendant's guilt or proper punishment. Jurors' assurance that restraints will not effect their decision should not lightly be dismissed. "Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees." *People v. Long*, 38 Cal.App.3d at 689.

Furthermore, the charge against the defendant should also be evaluated. For example, a jury would not be surprised to see restraints on a defendant in a case involving a prison crime. *Harrell v. Israel*, 672 F.2d at 638 (it is not unreasonable to assume that the jury would naturally expect that when inmates appear in court, either as parties or witnesses, adequate security measures would be taken"). The fact that a defendant is already an inmate in prison and the jury is aware of the defendant's prisoner status are a important factors to consider when evaluating prejudice. *State v. Gilbert*, 429 A.2d 323, 327 (N.H. 1981).

Finally, the strength of the evidence against the defendant should be considered. Overwhelming evidence of guilt may overcome the improper or even egregious, imposition of restraints. *See State v. Johnson*, 489 So.2d 301, 304 (La. Ct. App. 1986) (restraints harmless in light of five eyewitnesses and substantial evidence against defendant). In such a situation, the lack of restraints could not have made a difference to the outcome of the trial. Accordingly, strong evidence of guilt or overwhelming aggravating evidence cannot be ignored when evaluating the prejudice of even improperly imposed restraints.

Determining if restraints rendered a trial fundamentally unfair requires a reviewing court to consider the totality of the circumstances presented to the jury. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Unless the imposition of restraints rendered a trial fundamentally unfair, even if the restraints were unjustified, no due process violation

has occurred.

V.

THE MISSOURI SUPREME COURT PROPERLY REJECTED PETITIONER'S CONSTITUTIONAL ATTACK ON THE RESTRAINTS USED DURING THE PENALTY PHASE RETRIAL

The Missouri Supreme Court properly determined that the imposition of restraints on Petitioner during the retrial of the penalty phase of his capital case did not violate the United States Constitution. Petitioner has not established that the trial court abused its discretion, nor has he established that the imposition of restraints rendered his trial fundamentally unfair.

"An abuse of discretion will be found only where the trial court makes an arbitrary, capricious, whimsical, or manifestly unreasonable judgement." *F.D.I.C. v. Oldenberg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (internal quotes omitted). Here, in upholding the trial court's decision to restrain Petitioner, the Missouri Supreme Court found that "there was a risk that Appellant might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody." *State v. Deck*, 136 S.W.3d 481, 485 (Mo. 2004). Appellant's status as a repeat offender and the circumstances of the crime provided sufficient evidence for the trial court to conclude that he was an escape risk.

On this record, the trial court's factual finding that Petitioner was an escape risk was not clearly erroneous. *See, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (abuse of discretion found if trial court's decision was based "on a clearly erroneous assessment of the evidence"). Once the trial court concluded that Petitioner was an escape risk, the decision to impose restraints was justified. *See Billups v. Garrison*, 718

F.2d 665, 668-69 (4th Cir. 1983) (restraints justified when defendant "posed more than an average escape risk").

In addition to failing to establish that imposition of restraints was an abuse of discretion, Petitioner also has not carried his burden to establish that his trial was rendered fundamentally unfair. Preliminarily, as the Missouri Supreme Court found, Petitioner "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase." *Deck*, 136 S.W.3d at 485. Absent evidence of the visibility of the restraints, any determination of prejudice would be speculative.

However, even assuming the restraints were visible, Petitioner cannot establish that the penalty phase was rendered fundamentally unfair. Most significant to this issue was the jury's awareness that Petitioner was a convicted multiple murderer who would spend the rest of his life in prison. Under the circumstances, the jury likely expected Petitioner to be restrained. Indeed, the jury was fully aware that Petitioner was not heading home at the end of each day's court proceedings, but back to a prison cell. *See Wilkerson v. Whitley*, 16 F.3d 64, 67-68 (5th Cir. 1994), *vacated by* 16 F.3d at 68, *reinstated in relevant part*, 28 F.3d 498, 509 (5th Cir. 1994) (en banc) (harmless error for the trial court to try a convicted felon and inmate in improper restraints and handcuffs because the jury could have assumed that all inmates were tried in restraints).

Moreover, the evidence which supported the trial court's determination that Petitioner was an escape risk was before the jury during the penalty phase. When the jury is exposed to the very evidence which supports the trial court's decision, a reviewing court should presume that the jury interpreted the evidence in the same manner that the trial court did. Thus, rather than assume that the jury in this case speculated that the restraints were imposed because of a concern about Petitioner's dangerousness, the jury likely concluded that Petitioner was restrained to prevent an escape attempt. Jurors should not be presumed to jump to unsupported conclusions as to the reasons

for restraints in the face of the very evidence which establishes the actual reason for the restraints.

Finally, the venire panel in this case was specifically questioned about the effect that restraints would have on their decision. No members of the panel indicated that the restraints would affect them. As discussed above, this Court should give credence to the jurors' indication that restraints would not effect them. Furthermore, the questioning by counsel alerted the jurors, prior to trial, that the presence of restraints was not to be considered in their decision.

In sum, Petitioner has not established that the trial court abused its discretion in ordering him restrained during his penalty phase retrial. Furthermore, Petitioner has not established that the imposition of restraints rendered the proceedings fundamentally unfair. Accordingly, his due process claim should be denied.

CONCLUSION

The decision of the Missouri Supreme Court should be affirmed.

Dated: January 27, 2005

Respectfully submitted,

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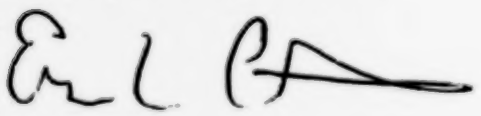

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